The Virginian-Pilot/Ledger Star, Capital Division of Landmark Communications, Inc., *and* International Printing and Graphic Communications Union, Local 54, AFL-CIO, Petitioners. Case 5-RC-10427

March 29, 1979

DECISION ON REVIEW

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On June 23, 1978, the Regional Director for Region 5 issued a Decision and Order in the above-entitled proceeding in which he found inappropriate Petitioner's requested unit of all district supervisors employed by the Employer in its delivery and circulation department located in Norfolk, Virginia, on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Regional Director based his conclusion on the finding that district supervisors exercise supervisory authority over the Employer's youth carriers who he found are employees within Section 2(3). Thereafter, in accordance with Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a request for review of the Regional Director's decision asserting, *inter alia,* that the record supports a finding that the district supervisors are employees under Section 2(3), that the petitioned-for unit is appropriate, and that a substantial question of law or policy is raised because of the departure from officially reported Board precedent. The Employer filed a statement in opposition to the request for review and a memorandum in support thereof.

On August 28, 1978, the Board telegraphically granted Petitioner's request for review.

The Board has reviewed the rulings of the Hearing Officer made at the hearing held on May 1, 18, 19, and 25, 1978, and finds that they are free from prejudicial error. They are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record and the attached Decision of the Regional Director in light of the briefs[1] and with respect to the issues on review, and has decided to affirm the rulings, findings, and conclusions of the Regional Director. Accordingly, in agreement with the Regional Director, we shall dismiss the petition.[2]

ORDER

It is hereby ordered that the petition filed herein be, and it it hereby is, dismissed.

MEMBER TRUESDALE, dissenting:

In affirming the Regional Director's decision to dismiss the petition, my colleagues rely on his finding that youth carriers, who are allegedly supervised by district supervisors, are employees within the meaning of Section 2(3) of the Act. That finding, as is more fully discussed below, ignores the nature of the relationship between the youth carriers and this employer and the intermediary role played by parents in that relationship. These factors, in my view, compel the conclusion that youth carriers are not statutory employees and, therefore, that district supervisors are not statutory supervisors inasmuch as they exercise no supervisory authority over employees of this employer.[3] Accordingly, I would find, contrary to my colleagues, that the requested unit of district supervisors is an appropriate one for collective bargaining.

In previous cases involving the issue of employee versus independent contractor status, the Board has considered the positions of the parties as well as the evidence adduced in reaching its decision.[4] At the hearing in this matter, the Employer's stated position was that carriers were employees. However, the Employer's past characterization of the carriers belies its present position. Thus, in its literature, the Employer characterized a carrier as a "manager of an independent business" or a "little merchant," and its district supervisors were informed that carriers were independent contractors especially for the purposes of liability and loss. This characterization of the carriers was maintained until the instant petition was filed, when the Employer dispensed with the "little merchant" or "independent businessman" nomenclature, asserting that it was a mere fiction not descriptive of its relationship with the carriers. This sudden change in po-

[1] The Petitioner has requested oral argument. This request is hereby denied as the record and the briefs adequately present the issues and positions of the parties.

[2] In a recent decision on similar facts, the Board dismissed a petition for a unit of district managers, the equivalent of the district supervisors herein, based on the finding that youth carriers, over whom the district managers exercised statutory supervision, are employees within the meaning of Sec. 2(3) of the Act. See *Philadelphia Newspapers, Inc.*, 238 NLRB 835 (1978).

[3] Although the Regional Director found it unnecessary to determine the status of adult carriers, motor route carriers, and neighborhood counselors, who are alleged by the Employer to be employees supervised by district supervisors, it is clear from the record, as is more fully discussed below, that the Employer has clothed them with the indicia and status of independent contractors.

[4] See, e.g., *Philadelphia Newspapers, Inc., supra;* The *Suburban Newspaper Group—Moorestown News, Inc.*, 195 NLRB 438 (1972); *Newsday, Inc.*, 171 NLRB 1456 (1968); cf. *The Oakland Press Co. a Subsidiary of Capital Cities Communications, Inc.*, 229 NLRB 476 (1977).

sition is entitled, however, to little weight in view of the fact that the change occurred subsequent to the filing of the petition herein.[5]

Consistent with its characterization of carriers as independent contractors, the Employer has always treated carriers as nonemployees. Thus, unlike its regular employees, carriers are not on the Employer's payroll. Rather than wages or salaries, the carriers' compensation consists of the difference between the wholesale price of their newspapers and the amount of money they collect from their customers at the retail price. No deductions are made by the Employer from the carriers' profits for state and Federal taxes. They are not eligible for unemployment compensation, vacation benefits, or a Christmas bonus. Identification cards are not issued to them. Furthermore, carriers over 17 are required to sign a special agreement before assuming responsibility for delivery of a route;[6] carriers under 17 must have their parents sign a carrier-parent agreement secured by the posting of a $200 bond.[7] And, until the instant petition was filed, the Employer also required carriers to pay 25 cents per week for general insurance.

Also indicative of their independent contractor status is the fact that the carriers' overall opportunity for profit or loss lies almost entirely in their own efforts. Thus, as a general matter, carriers may increase profits through efficient operation of their route and by filling special delivery requests which may yield a tip. Profits can also be increased through optional solicitations of new customers on their routes. Extra earnings can also be gained by participation in the many contests offered by the Employer.

Similarly, the carriers' risk of loss is substantial, and they must determine how best to insulate their operations from loss. Thus, the carriers alone bear the loss when they are robbed or when a customer fails to pay.[8] If they provide poor service, their collections and tips may be affected, and they may lose customers. They must also decide whether to employ others and, if they do, they must determine the manner and amount of their compensation. All of these decisions, and others, materially affect the amount the carriers earn.

While the carriers' ability to increase their profits and their risk of loss is generally small, it is, as noted, not insubstantial but is commensurate with the small scale of their businesses. Recognition of this fact prompted the Fourth Circuit in *N.L.R.B.* v. *A. S. Abell Company*[9] to state:

> It is true that the profit realized by the carrier is not great and the risk undertaken not so large as that borne by many independent contractors, but this is so not because of publisher control but because the business is a small one.

With regard to the exercise of control by the Employer over the carrier's delivery operation, consideration must be given to the number of carriers *vis-a-vis* the number of district supervisors. The Regional Director found that district supervisors exercise substantial control over the carrier's day-to-day dealings. Yet, there are over 3,400 carriers, 100 motor route carriers, and 200 neighborhood counselors which 82 district supervisors purportedly oversee. Indeed, the average district supervisor is responsible for between 40 and 90 carriers, all of whom perform their delivery tasks at approximately the same time each day, depending on whether they deliver the morning or evening paper. Thus, the substantial control found by the Regional Director is unfounded in light of the number of carriers for whom a district supervisor is responsible, the short daily delivery schedule, and the relatively simple nature of the newspaper delivery tasks. Although some district supervisors may make suggestions concerning the manner and schedule of delivery, the carriers are free to deliver in any manner which results in timely delivery of the paper. The Employer's sole concern is with the end result—the timely delivery of the paper without customer complaint and prompt payment of amounts owed to it.

As noted, prospective carriers under age 17 must have their parents sign a carrier-parent agreement before a carrier can start working. This agreement underscores the unusual and important intermediary role played by parents in the carrier-employer relationship. The extensiveness of this role is reflected in the fact that when a child exhibits an interest in being a paper carrier, the district supervisor conducts the interview with both the parent and child present. When there is a misuse of money, a complaint, poor performance, or any other similar problem, the district supervisor often deals directly with the parent in resolving the problem. Indeed, the record establishes that the district supervisors have no authority to institute any discipline short of termination.[10] Thus, one district supervisor testified that as independent contractors, carriers could not be "discharged" or "fired" but only "terminated" since they were not employees.

[5] See *Purity Food Stores, Inc.*, 160 NLRB 651, 658, fn. 16 (1966).

[6] The record does not show the number of carriers over age 17.

[7] The overwhelming majority of carriers are under age 17. The average age of carriers is 13 on the morning paper and 14 on the evening paper.

[8] While, on occasion, the Employer has absorbed the loss when a carrier has been robbed and the carrier's parents refused to make up the loss, it is uncontroverted that the Employer's general policy is to hold the carrier and parent liable for such loss.

[9] 327 F.2d 1, 7 (4th Cir. 1964).

[10] The Employer's contract specifically reserves neither the authority to discipline carriers or the authority to control the details of their distributive process. By so doing, the contract evidences the Employer's intention to avoid creating an employer-employee relations.

The Employer's brief cites the testimony of a district supervisor who said she had been told by supervisors that "you do not fire carriers . . . you replace carriers . . . ."[11]

Consistent with their limited authority, the district supervisor often consults with and relies on the parent to exert pressure on the carrier to improve or to have them withdraw their consent for the child to perform as a carrier. The parents are also contacted by the district supervisor whenever there is a question of liability arising from damage to the property of a third party caused by the carrier or his substitutes and helpers, or when there is nonpayment of a bill to the Employer. Moreover, the parent sometimes substitutes for the carrier.

As a natural corollary of their youth, carriers necessarily require the continued guidance and supervision of their parents in their daily activities. Because of this continuing responsibility of parents for their children, it is only natural that the Employer actively recruits their aid in controlling the carriers in the operation of their routes. However, by interposing the parents into that relationship between the carrier and itself, the Employer has effectively severed its lines of control over the carrier. As a result, the intermediation of the parents into this relationship, along with other factors discussed above, compels the conclusion that carriers are independent contractors.

Newspapers with carriers, moreover, enjoy an exemption from most child welfare legislation on the theory that a newspaper route provides valuable training experience in the responsibilities of life for a young person. Because the carrier's job is viewed as one step in the child's learning process, the compensation received by carriers is considered incidental to their primary concerns of education and maturation. Recognizing the uniqueness of the carrier experience and his relationship with employers, the Board, in a number of cases, has held that paper carriers are not statutory employees.[12]

In reaching the conclusion that carriers are independent contractors, I have not overlooked other factors which, according to the Regional Director, show that carriers are employees. These factors, however, relate almost entirely to the result sought to be accomplished rather than the manner or means of its accomplishment. Thus, the Regional Director viewed geographic boundaries and delivery time frames as a function of the Employer's control. Yet, the former merely defines the job territory while the latter is a necessary product of satisfying customer desires. In short, neither is particularly probative of an employer-employee relationship.

The Regional Director also noted that the carrier does not purchase and cannot sell his route. This finding, however, ignores the sizeable liability undertaken in the carrier-parent agreement and ignores the carriers' personal investment in supplies (such as plastic sleeves, bands, and calendars) and equipment (such as a coaster wagon, bicycle, bag, or even a car). Furthermore, while there is a technical absence of a proprietary interest in the route, other factors, such as the entrepreneurial aspects, risks of loss, and opportunities for profit, outweight the importance of this factor.[13]

Contrary to the Regional Director's finding, the record evidence establishes that paper carriers perform the actual physical delivery of the newspapers largely uninhibited by employer control. The carriers' contacts with the district supervisor, in the absence of complaints by customers, are generally few and routine. Thus, the substantial opportunity for the exercise of business discretion available to the carrier, as well as the large measure of control retained by him over the means and manner of delivery of the newspaper, and the Employer's prepetition position, as evidenced by its literature and its statements to its district supervisors that carriers are independent contractors, clearly requires the conclusion that carriers are independent contractors.

In view of his finding that paper carriers are employees, the Regional Director found it unnecessary to determine the status of the motor route carriers and neighborhood counselors who are allegedly supervised by the district supervisors. Inasmuch as I consider his finding regarding the paper carriers to be error, it is necessary to resolve their status.

In its brief, the Employer takes the position that neighborhood counselors are statutory employees. However, its agreement with neighborhood counselors, which is terminable on 30 days' notice, characterizes the relationship between the parties as "that of owner and individual contractor." The Employer's instructional booklet, which is distributed to prospective neighborhood counselors, states that the neighborhood counselor is "not an employee" of the Employer, but is one who "owns and operates an independent business."

As with paper carriers, the Employer treats neighborhood counselors as independent contractors. They are not paid wages, taxes are not withheld, and they do not receive any of the benefits accorded to regular

[11] Employer's brief, p. 23.

[12] See *The Oakland Press Co., supra; El Mundo, Inc.*, 167 NLRB 760 (1970); *Eureka Newspapers, Inc.*, 154 NLRB 1181 (1965); *Buffalo Courier-Express, Inc.*, 129 NLRB 932 (1960).

[13] See *Brown v. N.L.R.B.*, 462 F.2d 699 (9th Cir., 1972).

employees. They personally sustain losses from money stolen from them and appoint their own substitutes and helpers at wages determined solely by them.

Similarly, motor route carriers also sign an agreement with the Employer which states that the carriers shall perform the agreement "according to his *own means* and by his *own methods,* which means and methods shall be under [his] exclusive ownership and/or control." [Emphasis supplied.] Like the neighborhood counselor agreement, the motor route agreement is terminable on 30-days' notice. Under the contract, the carrier undertakes all liabilities and is solely responsible for the purchase and maintenance of a motor vehicle. Motor carriers also appoint their own substitutes, hire their own helpers, and schedule their own vacations. Because of the distances traveled by motor carriers on their route, their contacts with district supervisors are few and routine. Indeed, one district supervisor testified that she had never met a motor route carrier assigned to her.

As is clear from the above, the Employer's contracts with neighborhood counselors and motor route carriers specifically disavow any intention to control the details of the distributive process and attempt to insulate the Employer from any liability arising from their distribution operations. By so doing, the contracts both implicitly and explicitly define the relationship they create as that of independent contractor.

In conclusion, I am satisfied that the record establishes that neighborhood counselors, motor route carriers, and paper carriers are independent contractors and not employees of this Employer. Accordingly, in the absence of supervision over statutory employees, I would find that the district supervisors are employees and, thus, constitute an appropriate unit for collective bargaining.